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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 82-122

CENTURY AIR FREIGHT, INC.,
Petitioner,

against

CIVIL AERONAUTICS BOARD and AMERICAN AIRLINES, INC.,
Respondents.

PETITIONER'S REPLY BRIEF

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ARGUMENT

The premise of the petition of Century Air Freight, Inc., ("Century") is that if Congress, in the enactment of §1002(k) of the Aviation Act, 49 U.S.C. §1482(k), intended to mandate common carriage as the basis for air transportation of goods in commerce, the inference is compelling that, as a pervasively fundamental measure for the protection of the shipping public, the interpretation, application and enforcement of that statute is, in its manifest actualities and as a conclusion of law, a matter of intensely important public interest.

1. In the progression of administrative adjudication and judicial review, respondent Civil Aeronautics

Board ("CAB"), by its Orders (Pet., Appendices 2 and 3) approved and gave legal sanction to a virtually unbridled right on the part of respondent American Airlines, Inc. ("American") to select or reject shippers of containerized cargo for yearly allocation of space aboard its prime time flight. On review, the Court below explicitly upheld the validity of the CAB's "allowing American Airlines to refuse reasonable requests for service" (Pet., Appendix 1), notwithstanding that all requests were for the same service offering of American, viz., the carriage of containerized general commodity cargo (Pet., p. 49).

Now, in his Memorandum for the CAB, the Solicitor General makes frontal attack on §1002(k) of the Act (Text in Pet., pp. 2-5). Thus at page 6 of his Memorandum:

> "* * * The definition of 'interstate air transportation of property' in Section 1002(k) therefore was added in 1977 for the purpose of defining the kind of rates that would thereafter be free of the Board's traditional rate jurisdiction. See Pub. L. No. 95-163, Section 18(e)(1), 91 Stat. 1287; H.R. Repb. No. 95-773, 95th Cong., 1st Sess. 14 (1977). Petitioner thus clearly errs in contending that Section 1002(k) was intended to impose new duties on carriers.[1]
>
> * * * * * *

"1 Section 404 (a), 49 U.S.C. (Supp. IV) 1374 (a), imposes on airlines the traditional common carrier duty of providing transportation upon reasonable request therefor * * *.' The Board, however, has exempted carriers from that duty with respect to domestic cargo transportation. 14 C.F.R. 291.30-291.35. See *National*

Small Shipments Traffic Conference, Inc. v. CAB, 618 F.2d 819, 831-832 (D.C. Cir. 1980)."

Whether the foregoing is or is not actually the case, both the public and the Congress which enacted it, ought to have the benefit of an authoritative decision by this Court as to whether §1002(k) of the Act which is wholly devoted to defining "air transportation" in terms of common carriage, starts by providing that

> " * * * the term 'interstate air transportation of property' means —
>
> "(A) the carriage by aircraft of property as a common carrier for compensation or hire in commerce * * * ",

repeat the phrase "common carrier" eleven times thereafter and never once utters the word "rates" nor makes even remote reference to that subject, was not really intended to be, as it so directly reads, a fresh imposition of common carrier duties and status upon the operators of scheduled commercial aircraft, rather than, unintelligible from the statutory text, a statute "for the purpose of defining the kind of rates that would thereafter be free of the Board's traditional rate jurisdiction."

Nothing in the entirety of Public Law, No. 95-163 of November 9, 1977; 91 Stat. 1278-1289, nor of H.R. Report No. 95-773, 95th Congress, 1st Session 1977, U.S. Code Congressional and Administrative News Service, 3396-3400, supports the position of the Solicitor General's Memorandum; the actual rate amendments are clustered in §1002(d) and (g); the common carrier enactment of §1002(k), wholly new, is

palpably an undiluted mandate for common carrier status and duties imposed on air carriers of freight.

And the CAB's present position, expressed in the footnote at page 6 of its Memorandum to the effect that the domestic cargo exemption from §404(a)'s duty to carry on reasonable request has worked a *pro tanto* repeal of common carrier status and duties, is belied by the CAB's own authoritative statement in its Regulations ER-1080 of November 9, 1978 issued simultaneously with the exemption:

"Duty to Carry

"The Board is also exempting carriers in domestic cargo transportation from the duty under section 404 (a) of the Act to carry on reasonable request, * * *

"This exemption, however, does not relieve the carriers of their service obligations as common carriers, * * *. Carriers holding certificates under section 401 or 418 of the Act remain, *by definition*, common carriers. The statutory duty to provide service upon reasonable request is broader than the service obligations of a common carrier at common law. At common law, a carrier is permitted to hold itself out as a carrier of only a particular kind of freight, and is not obligated to carry other types of cargo. This exemption, therefore, only ends the Board's role in regulating the extent of the carriers' service offerings, * * *." (emphasis supplied, Pet. pp. 5, 6)

The holding of the Court below in the 1980 case of *National Small Shipments Traffic Conference v. CAB*, 618 F. 2d 819, is consistent with the CAB's narrow construction—in deference to and recognition of the common carrier status and duties imposed by §1002(k)—confining exemption from the duty to carry on reasonable request to a carrier's right to limit its

range of service offerings, and to refuse carriage for goods outside of those categories of goods which it holds itself out as carrying, e.g., bulk cargo as against containerized freight, perishables, explosives, live animals, and the like. The petitioners in that case were representatives of specialty shippers and the Court's holding was that the carriers could, under the exemption from the duty to carry on reasonable request, refuse to carry petitioners' categories of goods.

This case therefore is the first instance to reach this Court where the CAB and the Court of Appeals have crossed the line of mere limitation of service offerings to validate the right of carriers to refuse to honor the reasonable requests of some shippers tendering the same goods the carrier regularly carries for others, to select or reject such customers, and to negotiate with each customer the terms upon which the carrier will transport his goods. In short, notwithstanding §1002(k) of the Aviation Act, the CAB has here exempted domestic air carriers from the need to comply with the mandates for common carriers required by that statute.

2. If we regard the issue of the status of §1002(k) of the Act as mandating common carriage status and duties upon air carriers of goods as an important question of federal law, decided by the CAB and the Court of Appeals, which ought to be but has not been settled by this Court, then it ought not to be allowed to be sidetracked by extraneous arguments not going to that issue.

Such an argument is presented at pages 6 and 7 of the Memorandum for the CAB to the effect that the virtually boundless power of the CAB, under §§411

and 1002(a) of the Act; 49 U.S.C. secs. 1381 and 1482(a), to dismiss a complainant's administrative complaint on a finding that a formal investigation would not be in the public interest — citing *Flying Tiger Line, Inc. v. CAB*, 350 F2d 462 (LD.C. Cir. 1965), *cert. denied*, 385 U.S. 945 (1966), *Flight Engineers International Association v. CAB*, 332 F.2d 312 (D.C. Cir. 1964), *Trailways of New England, Inc. v. CAB*, 412 F.2d 926 (1st Cir. 1969), and *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79 (1956) — somehow survives to endow the CAB with an immunity, *after* it has instituted a formal proceeding, from having to comply with the rules of law applicable to the particular case.

Section 411 of the Act, 49 U.S.C. sdec. 1381, makes it abundantly clear how absolute is that power, properly timed in a preliminary stage, to block beyond judicial review any further action in an administrative matter:

> "§411 *Methods of competition*
>
> The Board may, upon its own initiative or upon complaint by any air carrier * * * *if it considers that such action by it would be in the interest of the public*, investigate and determine whether any air carrier *** has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, *after notice and hearing*, that such air carrier * * * is engaged in such unfair or deceptive practices * * *, it shall order such air carrier * * * to cease and desist from such practices or methods of competition." (emphasis supplied)

But here the agency dismissed no complaints; indeed it issued its own complaint and instituted a formal Enforcement Proceeding against American:

AMERICAN AIRLINES, Inc.
NEW YORK — SAN JUAN CARGO SERVICE

Enforcement Proceeding
Docket 37278

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and with the institution of that proceeding the CAB's actions and orders came under the rule of legal accountability prescribed by 5 U.S.C. §706 of the Administrative Procedures Act (Petition, Appendix 4, p. 69), including, of course, the question of the validity of its orders herein under §1002(k) of the Act.

Finally, given the public importance of the question of statutory common carriage here presented to this Court for authoritative settlement, it is simply inconceivable that American has the unilateral power, simply by changing flight schedules on the same actively maintained route, to foreclose review and settlement that would otherwise be had but for the "mootness" claimed for the issue. The Congress which enacted §1002(k) of the Act, the shipping public — including Century as a member of that public — which the statute was obviously intended to protect, and the industry itself ought to have the benefit of this Court's adjudication of the issue.

3. We point out the oversight in the caption of the Solicitor General's Memorandum in omitting

American Airlines, Inc. as a party respondent in this certiorari proceeding.

WHEREFORE PETITIONER EARNESTLY REITERATES ITS PRAYER FOR THE GRANT OF A WRIT OF CERTIORARI HEREIN.

Respectfully submitted,

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